Wie die NSA wurde, was sie ist

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I. Introduction

If—as the English saying goes—timing is everything, then the start of my work with KoRSE last week and my lecture today could hardly be more opportune. Security and surveillance are leading global issues in ways that they have not been for years. The story of Edward Snowden's revelation of America's rapacious security and surveillance operations—and his ongoing flight from American attempts to prosecute him—is as dramatic and fast-moving as anything Hollywood could dream-up.

But the intensely contemporary nature of my topic gives me pause for at least two reasons.

First, I am very well aware that news of American surveillance and espionage has stirred alarm and resentment throughout German society, sending shock waves all the way to the Kanzleramt. Personal and political relations between our countries are once again strained. With this in mind, I hope you will understand if I offer the following caveat for today's lecture. As a simple law professor I am not in a position to speak for or defend the Obama Administration's policies. I do have some personal and professional insight into the thinking of the President's team, which I am happy to share with you, for whatever it is worth. And, as an American voter, I assure you that I take my democratic responsibility for the actions of my government very seriously. But these might be the limits of my ability to respond directly to and account for the developments of the last month.

Second, as a simple law professor, I must admit to having some anxiety about speaking today on a topic that can be described as "dramatic and fast-moving." In many ways, these are the antinomies of good scholarship, which might be more properly described as "plodding and tedious." There is a reason, I suppose, why professors play such an unimportant role in the canon of American action films. This concern requires me to offer yet another caveat for today's lecture. I don't intend to try to paint a full picture of the still-unfolding, frenetic developments of the last weeks. For now that is a task better left to the media, particularly the excellent journalists on both sides of the Atlantic who are doing important work in covering the story.

Instead, I want to turn to history. In particular, the history of the 1975 Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. Mercifully, this Senate investigation came to be known by the name of its Chairman, U.S. Senator Frank Church. I will refer to it—as is now common—as the Church Committee or merely the committee; I hope that it won't be confused with some legislative program aiming to promote religion in America (which would likely be unconstitutional and, in any case, might seem unnecessary in light of Americans' general enthusiasm for religion). This is not just history for history's sake. I believe

that the Church Committee provides essential background and presents poignant parallels for better understanding these contemporary events. First and foremost, that is true for an audience of foreign jurists and legal scholars because a reflection on the Church Committee provides a useful framework for introducing parts of the constitutional and statutory regime relevant to the balance America has struck between security and liberty. The Church Committee is also relevant to Edward Snowden, PRISM, and all the rest because it broadens the canvas with which we are working—allowing us to reach across almost a half-century of American security policy involving presidential administrations of both political parties—so that we can begin to develop some deeper conclusions about "U.S. National Security, Intelligence and Democracy."

II. The Church Committee

New Yorkers awoke to a cold and clear mid-winter day on Sunday, December 22, 1974. The holiday mood had been tempered by sharply rising inflation and news of bombings at famed London retailers. The New York Times had other explosive news to report. Under the headline "Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years," the paper published Seymour Hersh's devastating and detailed report on the dark nature and dreadful extent of the American national security state. Hersh wrote about tens of thousands of Americans under CIA surveillance, including members of Congress, often by direct order of the Nixon White House. The surveillance was aimed at monitoring and undermining antiwar campaigners, especially in America's 1968 student movement. Hersh reported on sinister American clandestine operations around the world, including scores of assassination attempts involving heads of state. With both of these undertakings—foreign and domestic security excesses—the presidency and the CIA were pushing America's long-standing—but fraying—anti-communist Cold War cultural consensus to its logical extreme. The problem was, as Hersh put it with some mild understatement, the CIA's domestic break-ins and wiretaps were a "massive illegality" and a direct violation of the CIA's 1947 charter, which forbade it from engaging in any domestic security functions.

The thoroughly documented accounts of the CIA's domestic operations shocked an America that was already seething with anti-war sentiment and deepening distrust for the government following President Nixon's Watergate scandal. Perhaps the reaction to Hersh's story that best expresses the anger and dismay it unleashed is the fact that, just thirty days later, the U.S. Senate voted 82-4 to launch an independent investigation into U.S. intelligence activities. Frank Church, the well-respected Senator from Idaho, was appointed chair of the eleven-member Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. This was to be a serious and probing investigation into "illegal, improper and unethical" conduct by America's intelligence apparatus. Some of the most prominent names in American politics lent their reputations to the effort, including committee members Walter Mondale (D) [future Vice President], Howard Baker (R) [future Senate Majority Leader and future White House Chief of Staff], and Barry Goldwater (R) [1964 Republican Presidential Candidate]. President Ford was so jarred by the Senate's swift and bi-partisan response that he quickly cobbled

together a proxy commission of his own in the hopes of defusing what he called “that congressional circus.”

It is as natural for Americans, as it is perhaps discomforting for Germans, to pay considerable attention to the personalities involved in such affairs. In matters of jurisprudence this is part of our tradition of “legal realism.” And even if we have moved on from Holmes’ fundamentalist views on the inherently political and personal nature of the law, we still have the instinct that knowing something about the people who make legal decisions counts as valued legal insight. That is why so much media coverage—and even scholarship—about our Supreme Court focuses on the justices’ personal politics. Of course, this is a less controversial proposition in political matters, even if party platforms remain more important than identity politics in Germany.

This American perspective might justify me in saying a few words about Senator Frank Church, who was repeatedly elected to the Senate as a Democrat from the staunchly conservative state of Idaho. Despite this ideological mismatch, it seems Church’s constituents admired his rugged, independent flair, which is characteristic of that wild, sparsely populated, mountainous western state. By the time Church assumed the chairmanship of the Church Committee, he had earned a reputation as a stalwart progressive voice, an opponent of the Viet Nam War, and a determined advocate for constitutional government in the face of America’s Cold War security obsession. In 1972, for example, he chaired the special committee that investigated President Nixon’s military operations in Cambodia. Also in 1972, Church abandoned the long-standing, unspoken expectation of Congressional acquiescence towards the CIA when he convened the Senate Foreign Relations Subcommittee on Multinational Corporations to investigate collusion between the company IT&T and the CIA in promoting coups around the world. Just days after Church concluded the hearings in the IT&T investigation, the Allende government was overthrown in Chile, creating the impression that the CIA needed to move quickly out of fear that Church’s efforts were brining an era of unaccountable secrecy and autonomy to an end.

In all of this, Church was a principled pragmatic. He was offended by the way American covert policy disregarded what he viewed as the uniquely American values of democracy and the rule of law. But he was equally troubled by the evidence he had gathered that these abuses were more likely to endanger American interests than promote them. He might have known something about necessary and effective intelligence work; he served as an intelligence officer for the U.S. Army in the Pacific Theater during WWII. What he saw instead was a reckless, cowboy mentality in the American intelligence community that led him to lament, at the conclusion of the IT&T investigation: “Who can blame others for thinking the worst of us?”

Church brought the same values and vision to his leadership of the Church Committee, about which I will offer more detail in a moment. Before I do that, however, let me add that Church paid a great personal price for this work with the committee. A dominant figure in the Democratic Party of his era, Church was widely thought to be a leading candidate for the Party’s 1976 presidential nomination. Archived materials, including letters he exchanged with his wife, reveal that his commitment to the work and mission of the committee delayed the announcement

of his candidacy until March, 1976—just seven short months before the imminent election. Despite this delay, Church won four Democratic Party state primaries. But he was not able to make-up for lost time and lost momentum and he eventually conceded the race to Jimmy Carter. There is every reason to believe he might have won the nomination had he given his presidential aspirations priority. And in the first post-Watergate election, it seemed certain that the Democratic nominee would win the White House, as Jimmy Carter did.

Instead, Church became a hated target of the anti-communist right in America, which campaigned aggressively against him in the years after his leadership of the Church Committee. Henry Kissinger, for example, accused Church of wrecking the CIA. And his principles were spun into allegations of weakness and naiveté in the face of the brutal, uncompromising Soviet threat. In the national media Church was called a “red” and a “communist sympathizer.” The attacks piled up, and the National Conservative Action Committee poured resources into defeating Church when he stood for reelection in 1980. He lost by less than one-percent of the vote and was dead from pancreatic cancer just four years later.

In a significant way, it must be said, Church’s critics were right. Thanks to his leadership of the committee America’s intelligence machinery was changed forever. Those institutions were used to operating outside the light of public accountability, driven by a wild west mentality that believed the ends justified all means and that the security services enjoyed impunity from the limits of constitutional governance. After the Church Committee’s work American intelligence operations came to be exposed to permanent oversight and are now obliged to operate within the confines of a complex statutory regime.

In both its rigor and the startling nature of its revelations, the Church Committee’s investigation remains the most “comprehensive and thoughtfully critical study [ever] made of the shadowy world of U.S. intelligence.” Nothing like it has occurred since. And at least one commentator has wondered if anything like it has ever been done in any other country. The Church Committee was given two mandates. First, the committee was to investigate domestic intelligence activities to determine whether they conformed with the law, especially constitutional limits on executive power and the constitutional protection of individual liberty. Second, the committee was to investigate America’s foreign intelligence activities to assess whether they were consistent with America’s ideals and interests. To reinforce the committee’s bi-partisan credibility and good will, Church was wise to insist that the committee’s investigation would include presidential administrations of both parties, dating back to the Kennedy White House. This was the committee’s modest project: shine light into every corner of more than a quarter-century of America’s vast, secretive intelligence empire (including the CIA, the FBI, the Defense Intelligence Agency, the NSA, the federal tax authorities, and other institutions) in the face of Presidential and agency hostility.

Of course, the committee was understaffed and poorly funded. And all of its members had their other senatorial duties to distract them. Still, the committee managed an 18 month investigation consisting of more than one hundred full committee hearings, hundreds more subcommittee hearings, scores of depositions

of individual witnesses, the review of nearly a ton of subpoenaed documents, and the publication of scores of staff reports. It was truly as complete an investigation of the U.S. intelligence apparatus across the whole of the cold war as was possible under the circumstances.The committee's efforts concluded in 1976 with the publication of 14 volumes of shocking and despairing reports.

With respect to the committee's domestic mandate, the reports documented decades of surveillance abuses, including infiltration that extended beyond national security information to the gathering of personal and political views. Often the operations sought to damage, destroy and discredit their targets. There was evidence that these activities had been employed for the political advantage of presidents. And, above all, it seemed the appetite for domestic intelligence was constantly expanding. It is difficult to highlight specific details from such an extensive project, involving more than 50,000 pages of reports, testimony, documents and commentary. But perhaps the following gives a flavor of the committee's sweeping and troubling findings. First, huge numbers of Americans (both ordinary and prominent—including Richard Nixon and Frank Church!) were affected by surveillance that involved access to mail and telegraphs, wire-tapping, and the use of live informants. These widespread and invasive surveillance operations had names such as COINTELPRO and the Houston Plan. Second, the full political spectrum was touched by the abuses, ranging from the Women's Liberation Movement to the neo-conservative John Birch Society. Third, as is typical of America, race played a uniquely central and pathological role in the abuses. The committee discovered that the leading African-American civil rights organization, the NAACP, had been the special object of intense surveillance for more than three decades. Grotesquely, the Church Committee reports documented the American intelligence community's persecution of Dr. Martin Luther King. The "covert war" to discredit the civil rights leader reached its nadir with repeated attempts to pressure King to commit suicide with threats that tapes from his bugged hotel rooms would be released to the public.

With respect to the committee's international mandate, the reports uncovered undemocratic and unethical covert activities abroad, including American involvement in the 1973 Chilean coup, assassination plots around the world, and other troubling covert and counterintelligence actions. All of this came to light in one of the committee's most dramatic moments, featuring a closed door session with CIA Director William Colby. With only the committee's senatorial members present, Colby delivered what came to be known as the "family jewels"—details about all of the CIA's most secret and disconcerting programs. As suggested earlier, the litany of abuses included coup-plots and assassination attempts and an almost demented fixation on the destruction of Fidel Castro. Former U.S. Senator Gary Hart, the youngest member of the Church Committee, reported years later that during this session he sat quietly and watched the horrified looks of his more seasoned, senior colleagues. "Barry Goldwater was clearly shocked," Hart said. "The thought that America had been in the assassination business shocked him."

Perhaps it makes some sense to linger just a little over the Church Committee's 165 page fifth report, entitled "The National Security Agency and Fourth Amendment Rights." The report's title alone was a revelation because, until the Church

Committee's investigation, the NSA was almost unknown to Americans, earning it the nick-name "No Such Agency" in the American Cold War intelligence community. Established in 1952 by an executive order from President Truman, the NSA was supposed to consolidate and secure America's code-breaking advantages after WWII. The agency's mandate, refined and expanded by an executive order from President Regan, is disturbingly broad. The NSA is charged with "collecting (including through clandestine means), processing, analyzing, producing, and disseminating signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions." The NSA is a nearly complete presidential estate. A praise-worthy example of civilian and democratic control of the military, the U.S. Constitution makes the President the "Commander and Chief of the Army and Navy of the United States." The president's power in the realm of military affairs is almost total, with the notable exceptions of the Constitution's assignment of military budgetary authority to the Congress and the Congress' authority to declare war. Significantly, President Truman created the NSA as a unit of the Department of Defense so that it operates within this jealously-guarded executive domain. Its director is usually a high-ranking military officer, even though it is largely staffed by civilians. Today the NSA describes itself in these modest and reassuring terms:

- the NSA's "vision" is "global cryptologic dominance through responsive presence and network advantage
- the NSA's "values" include the "protection of national security interests by adhering to the highest standards of behavior"

The NSA is the largest, most secretive, and likely the most expensive of America's many intelligence institutions. It is thought to employ around 40,000 people, although the NSA's Deputy Director once jokingly put the figure between 30,000 and one billion staffers. Its signals intelligence and information efforts—supposedly aimed only at foreign sources—is said to involve the interception of 1.7 billion radio, email, telephone, internet, and other communications each day, only a fraction of which are sorted across 70 different categories of security interests.

The Church Committee's report on the NSA is indispensable reading for a proper understanding of the risks this super secretive institution poses for the enjoyment of liberty and privacy. It also provides invaluable insight into the Foreign Intelligence Surveillance Act, which is the single most important piece of American security legislation. That statutory regime was extensively prefigured and debated in the hearings that contributed to the Church Committee's report on the NSA. First, as for the risks, the committee called the NSA the intelligence community's most secretive and reticent institution, noting that there was no statutory mandate and that its charter consisted in executive orders that did not provide a clear definition of the "technical and intelligence information" the NSA had been created to collect. The committee noted that representatives of the NSA had never before appeared before the Congress to account for the agency's activities. In terms that resonate quite poignantly today, Senator Church concluded that the NSA poses a tremendous potential for abuse:

> The NSA has the capacity to monitor the private communications of American citizens without the use of “bug” or “tap”. The interception of international communications signals sent through the air is the job of the NSA; and thanks to modern technological developments, it does its job very well. The danger lies in the ability of the NSA to turn its awesome technology against domestic communications … Indeed … a previous administration and a former NSA Director favored using this potential against certain U.S. citizens for domestic intelligence purposes.

The committee found that such excesses had in fact occurred. Advised by Harvard Law Professor Philipp Heymann, the committee urged legislative action to ensure the protection of Americans’ liberties. Professor Heymann insisted to the committee that

Ultimately the Congress is going to have to pass a statute that sets forth standards and then requires a warrant from a court [for NSA activities] … Congress is going to have to set forth the standards and courts are going to have to come in and apply them.

Spurred on by the Church Committee’s reports, that is exactly what Congress did.

III. The Impact of the Church Committee

The Church Committee can be credited with a number of reforms leading to statutory limits on intelligence services’ activities and requiring permanent Congressional oversight of America’s intelligence apparatus. Although demonized by the staunchest cold warriors, many of these reforms were meant to protect and empower the American intelligence services by giving them sound Congressional authority, clear standards for their activities, and the reassurance that they would not be sacrificed to political expedience. As an example of the latter, the Hughes—Ryan Act required the White House to issue written approval for all foreign covert actions so that presidents could no longer cast the blame for their botched covert programs on rogue and unaccountable security institutions.

But it is the former reform—the creation of standards, requiring judicial approval, and congressional oversight—that has had the most significant impact on American intelligence operations. Several new statutory schemes pursuing these aims emerged from the Church Committee’s investigation and the most important is the Foreign Intelligence Surveillance Act of 1978. This was the reform that Professor Heymann advocated when he was called to testify as part of the Church Committee’s NSA hearings. And this is the most prominent part of the legal framework relevant to the Snowden affair.

The Foreign Intelligence Surveillance Act—or FISA—does exactly what the Church Committee hoped. First, it established standards for American intelligence surveillance. Second, it created a secret court—the Foreign Intelligence Surveillance Court (FISC)—for the enforcement of those standards. Third, it established permanent congressional oversight of these operations. This regime covers government conduct relating to a broad range of intelligence activities, including electronic surveillance, physical searches, the use of devices for the collection of phone numbers and other electronic “addresses”, and access to business records

for intelligence purposes. As the regime's title makes clear, the standards and procedures established are meant to apply to the government's collection of foreign intelligence information, that is, information communicated outside America by what the law calls "non-U.S. persons."

Because it was a central interest for the committee in preparing its NSA Report, I might pause to explain, very briefly, the relationship between FISA and the Fourth Amendment to the U.S. Constitution, which provides general basic liberty protection against the government's "searches and seizures." It might be thought that the Fourth Amendment prohibits—or at least minimizes—surveillance of the kind in which the NSA is involved. Two things, however, limit the constitution's role here. First, the Supreme Court has found that the Fourth Amendment does not provide protection to non-citizens who are outside the American jurisdiction. Second, while the Fourth Amendment applies to Americans abroad and all persons within America's jurisdiction, it does not prohibit searches and seizures. Instead, it merely requires that surveillance meet one of two conditions.

On one hand, it may be authorized by a neutral court that issues a warrant after being convinced that there is probable cause to believe that a crime has been or is about to be committed. That is the tougher standard. On the other hand, it is constitutionally permissible if the surveillance is believed to be reasonable—an assessment made by a court after the search or seizure has already taken place.

This is a less rigorous standard. For constitutional purposes FISA principally does two things. First, it provides statutory authority, standards, and approval processes that makes intelligence gathering reasonable where the Fourth Amendment might be thought to apply. Second , it provides statutory authority, standards, and approval processes even in cases where the Fourth Amendment does not apply, including surveillance affecting non-U.S. persons abroad. There has been no definitive Supreme Court ruling on FISA's compatibility with the Fourth Amendment, although, not surprisingly, it is believed that the secretive Foreign Intelligence Surveillance Court has regularly determined that FISA provides the required constitutional protections.

Pursuant to FISA—and here I am painting with the broadest strokes—there are only two ways for the American government to collect intelligence information, each involving a distinct standard. In the first instance the President, in conjunction with the Attorney General, can undertake intelligence gathering activities (including electronic surveillance) without a court order of any kind. But every discrete effort must be limited to just a twelve month operation, must be aimed at gathering foreign intelligence information, and only foreign powers or their agents may be targeted in this way. In these circumstances it must be established that there is no substantial likelihood that the surveillance will acquire the content of any communication to which a U.S. person is a party. The Attorney General must certify all of this to the Foreign Intelligence Surveillance Court and report on compliance to the standing congressional oversight committees. Alternatively, intelligence operatives can request a warrant for electronic surveillance from the Foreign Intelligence Surveillance Court. But an intelligence warrant requires a showing that there is probable cause to believe that the target is a foreign power or an agent of a foreign

power—or, since 2004, a “lone wolf” terrorist threat not affiliated with a foreign government. The court will issue an intelligence warrant under these conditions only if the risk of gathering information pertaining to U.S. persons is appropriately minimized.

FISA has been amended many times, especially in the post-9/11 era. But this general framework, handed down almost directly from the Church Committee, remains in place. The amendments to the law have had two main characteristics. First, they have expanded the range of potential FISA targets. Second, they have softened the government’s burden in cases involving incidental contact with the communications of a U.S. person. The programs revealed by Edward Snowden, including the extensive surveillance operation known as PRISM and the massive data-mining operation, have been defended by the Obama administration as squarely within the more permissive standards created by the 2008 amendments to FISA. With respect to PRISM, rights advocates have argued that the amendments jeopardized the protections of the Fourth Amendment by substituting minimization standards for the warrant that had been require for surveillance that incidentally implicates a U.S. person. The 2008 amendments also seem to have moved away from case-by-case authorizations of discrete incidents of surveillance to the approval of large-scale surveillance operations. With respect to the NSA’s data-mining operation, the Obama Administration has argued that the information involved was never protected by the Fourth Amendment, which doesn’t provide privacy to information held out to the public, including Internet and other telecommunications providers.

But here I have already waded farther into legal commentary on the Snowden affair than I intended. That seems a particularly ill-advised undertaking at this point in any event, considering that we do not yet have the fullest picture of the programs involved and the government’s legal defense of its activities.

For me, the point was to underscore the fact that the FISA regime, a revolution of constitutional governance when enacted, was a direct product of the Church Committee. I would urge those interested in assessing the integrity of the FISA regime today to consider it in the light of the revelations of intelligence abuse documented by the Church Committee and the testimony given by Professor Heymann at the committee’s NSA hearing. Preventing a repeat of those troubling developments is the very DNA of the FISA regime.

IV. Reflecting on the Church Committee: Some Enduring Lessons About U.S. National Security, Intelligence and Democracy

I hope this reflection on the Church Committee, although ancient history relative to the rapidly unfolding nature of this area of law and policy, has been of some interest. Perhaps it has provided some valuable background for a better understanding of the way America has sought to balance security and liberty. In any case, I have tried to use this background as an opportunity to introduce—in the broadest terms—the

central legal components of the American scheme for regulating the conduct of the intelligence community, including the Fourth Amendment and FISA.

But in closing I would like to suggest a handful of deeper lessons we might draw about U.S. National Security, Intelligence and Democracy from this encounter with the Church Committee, especially if viewed in light of the intelligence crises of the Bush presidency and those of today. I will mention them here in the hope that they might form the basis of a lively discussion to take place after I conclude my remarks. And, of course, I expect you will have thought of other, similar parallels and themes.

First, I must say with considerable regret that Edward Snowden's revelations convince me—if I already wasn't persuaded—that the United States has become a thoroughgoing and unapologetic security state. We can longer be surprised by news of staggeringly wide-ranging intelligence activities that touch even American citizens. We must learn about them, perhaps through the activities of whistleblowers. And we should be outraged. But Americans must now assume that comprehensive—if not universal—surveillance is the rule and not the exception. This is a difficult reality to grapple with as an American progressive, because it was hopeful to believe that the aggrandizement of security at the expense of liberty and privacy was a particularly conservative and Republican tendency. That was the partisan narrative when, for example, the extensive and illegal warrantless surveillance program of the Bush years was exposed.

And this may be the most crippling consequence of the latest developments. To hear the Obama administration defend the NSA today in terms that are identical to those offered by the Bush White House before it suggests that the American security state has achieved a bi-partisan capture of America's elites. I have two reflections on this point. First, American elites' nearly universal embrace of the security state may actually reflect a rough American consensus. There is a rich body of comparative law scholarship, for example, that suggests that Americans have less existential understanding of privacy, at least relative the views held by Germans. There was, for example, no privacy anxiety in America associated with Google's "street view" system and there is nothing like the German debate over privacy protection with respect to data-mining. In fact, the latest polls suggest that an overwhelming majority of Americans think that Snowden should be prosecuted and that the country is evenly split on the wisdom of the invasive surveillance programs he exposed. The second reflection builds on the previous point. I worry that, in a democratic system so sensitively attuned to the interests of the majority, an unequivocal embrace of the security state has become necessary for political success. In fact, we might expect the worst from the Democrats, whose progressive legacy will require them—just as Obama seems determined to do—to give evidence of their security bona fides. In any case, neither party wants to campaign under the shadow of having allowed the next major terrorist attack to occur.

Second, I particularly want to draw this audience's attention to the fact that, in telling the story of arguably the apex of America's commitment to liberty in the face of the momentum and interests of the security state, I have told the story of Congressional action rather than presenting a series of Supreme Court decisions. This is an exception in American history, especially for a topic touching upon the question of

personal liberty. And I don't think it is just my bias as a constitutional law professor when I say that American liberty has as much been won through legal action and judicial reasoning as through democratic action. No case represents this view on American history as dramatically as the Supreme Court's 1954 decision in Brown v. Board of Education, in which the Court unanimously ruled that racial segregation in America's schools was unconstitutional, thereby calling into question the whole of America's apartheid regime. But women's rights, and free speech, and religious freedom, and recently even the rights of homosexuals can each claim their landmark Supreme Court cases. Yet, on the topic of liberty and security—indeed, even the broader topic of executive power—the Supreme Court has been conspicuously quiet.

This has much to do with the Court's respect for the intricate separation of powers achieved by the constitution, an approach it often enforces through what we call the "political question doctrine." I don't want to overstate this point. There are, of course, important decisions clarifying executive power in the face of grave national security concerns, including the Supreme Court's decisions from the last decade that limited and significantly reframed the Bush Administration's detention policies in the so-called "war on terror." But an important lesson of the history of the Church Committee is that, in America, an important—perhaps the most important—forum for redressing concerns about intelligence abuses is the Congress and the messy, unpredictable and majoritarian political processes that unfold in the capitol building.

Third, I want to note the absolutely essential role the free and independent press has played at every turn in the history of U.S. national security, intelligence and democracy. Seymour Hersh, Scott Shane, Erik Lichtblau and Glenn Greenwald have, in successive decades, published hard-nosed exposés that hint at the extremes of the American security state. This journalism, in turn, sometimes prods politicians towards reform. The central role played by the press in reaffirming our commitment to constitutional governance draws particular attention to the Obama Administration's unprecedented efforts to prosecute government whistleblowers, who traditionally have served as sources for effective reporting on security issues. Some experienced journalists in the national security field wonder if the prosecutions are a deliberate effort to chill the media's coverage of unseemly government policy. An easily overlooked element of the American balance between security and liberty is the precious protection the Constitution provides the free press—and the vigorous and professional work of daring journalists.

This history, and these broader themes, might just be enough for us to reflect on and discuss tonight—I hope they have provided some interesting and valued depth to the dramatic and fast-moving events that make this conversation important once again.
